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December 13, 1991

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RALPH H. PALUMBO
PARTNER

James A. Tupper
Assistant City Attorney
City of Seattle
Law Department
1111 Third Avenue, Suite 2640
Seattle, WA 98101

Re: Evergreen Marine Leasing Indemnity and Release

Dear Mr. Tupper:

Enclosed for your review, please find a proposed Indemnity Agreement and Release regarding the environmental contamination of the Evergreen Marine Leasing ("EML") property located at 7400 8th Avenue South and 7343 East Marginal Way South, in Seattle, Washington, including Slip 4 in the Duwamish Waterway (the "Property").

1. Facts

Slip 4 sediments are contaminated with polychlorinated biphenyls ("PCBs"), polynuclear aromatic hydrocarbons ("PAHs"), and heavy metals. Periodically, Slip 4 has been dredged to maintain adequate depth to allow barge access. Dredge spoils were deposited on the adjoining upland EML Property.

EPA, the Washington State Department of Ecology and other governmental agencies have conducted investigations of the extent and source of sediment contamination in Slip 4. Recent environmental investigations conducted by EML (and by independent environmental contractors retained by prospective purchasers of the Property) verify and further document the findings of EPA and Ecology. Slip 4 sediments are contaminated, principally with PCBs and heavy metals, at levels above applicable State and federal cleanup criteria. The source of sediment contamination

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is identified as the Georgetown Flume and the other outfalls that discharge to the head of Slip 4. (We have enclosed a copy of the chart showing contaminant levels that we presented at our meeting with you.) The City of Seattle owns, operates and/or maintains those outfalls, and it owns and operates the Georgetown Steam Plant, which has been identified as the primary source of the PCB contamination found in Slip 4.

The levels of contamination in Slip 4 and the adjoining upland properties will require further investigation, remediation and or restoration. The facts establish that the City of Seattle is responsible for a significant portion of the contamination and is therefore, a potentially responsible party for the remediation of this site.¹ In an effort to minimize both EML's and the City's costs, EML is offering the City this opportunity to voluntarily step forward and assume its responsibility.

2. Legal Liability

The City is liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, for the costs of investigating and remediating the environmental contamination and for natural resource damages, including the costs of controlling the source of the contamination, natural resource restoration and rehabilitation costs, and any damages for lost uses of the resources. Recent case law also allows recovery of attorneys' fees in CERCLA cost recovery actions. Also, because the discharge of pollutants to surface waters is expressly prohibited by RCW 90.48.080, the City's discharge of PCBs, PAHs and heavy metals to Slip 4 is unlawful under State law. Thus, the City is liable for damages under several legal theories including negligence, trespass and nuisance.

3. Costs and Damages

The presence of contamination in Slip 4 (a portion of which is owned currently by EML) has prevented EML from selling the Property because prospective buyers are unwilling to assume "owner" liability under CERCLA for the Slip 4 contamination. Buyers are unable to quantify the amount of the liability due to uncertainties about what actions will be required by State and federal environmental agencies and because of the pendency of the natural resource damage action brought by the National Oceanic and Atmospheric Administration ("NOAA") and other trustees

¹ Other potentially liable parties may include King County, Metro and the Boeing Company.

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against the City and Metro.² As a result, EML has not been able to sell the Property.

In connection with its best efforts attempts to sell the Property, EML has incurred costs and attorneys' fees conducting investigations of contamination in Slip 4 and the adjoining property.³ The approximate costs of environmental investigations conducted to date for the slip 4 alone are \$150,000 and attorneys' fees are approximately \$25,000. EML has incurred substantial additional consultants' and attorneys' fees with respect to the upland property.

EML suffered damages also because it has been unable to sell the Property. But for the contamination caused by the City, EML would have sold the Property in June 1990 for \$13,700,000.⁴ Assuming a reinvestment return rate of 10.5% on that amount for the past 17 months, EML has lost \$2,037,875 due to the contamination.

Finally, even if the property were completely remediated at this time, the current market value is \$9,372,000. Thus, the lost value from the 1990 selling price of \$13,700,000 to the 1991 market value of \$9,372,000 represents a loss to EML of \$4,328,000.

EML's total costs and damages to date arising from the sediment contamination in Slip 4 are approximately \$6,540,875. That amount will continue to increase so long as EML is unable to sell the Property.

4. Indemnity and Release Proposal

Based on the foregoing discussion, EML offers the attached Indemnity Agreement and Release as a resolution to this matter.

² EML is informed by NOAA that Slip 4 is one of the areas that will be considered for natural resource restoration actions.

³ EML's independent environmental consultant is Hart Crowser Associates, a well-qualified environmental engineering firm.

⁴ After spending a substantial amount of money conducting an environmental investigation of Slip 4 and the adjoining upland Property, the prospective buyer stated that it would not purchase of the Property because it could not accept potential "owner" liability for remediation costs and natural resource damages related to Slip 4 contamination.

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You will note that EML will agree to release and discharge the City from all claims that EML has or may assert against the City in regards to Slip 4 sediment contamination and the adjoining Property. In addition, EML will allow the City to exercise full control of the investigation and remediation efforts, with access to the Property.

In consideration of the release, the City will agree to indemnify and hold EML and any successors in interest harmless for claims and costs of investigation, cleanup, removal or restoration, source control actions, and natural resource damages for Slip 4 and Parcel D. We anticipate that the City indemnity will enable EML to sell the Property because it will relieve any concerns that prospective buyers may have regarding their liability for Slip 4.

In addition, EML requests that the City reimburse it for its costs and damages incurred to date. As I stated at our recent meeting, EML will consider reimbursement of less than the full amount of its damages if the City promptly agrees to the indemnity agreement attached hereto.

EML believes that the resolution suggested above is beneficial to both parties. EML will be able to achieve its goal of selling the Property. The City will resolve its liability to EML without costly litigation, and it will have the ability to manage the investigation, remediation, and restoration of Slip 4.

Please understand, however, that because of the significant amounts of money at issue in this matter, EML is prepared to file suit if it proves to be the only viable course of action. If EML is required to initiate legal action against the City, it will seek to recover the full amount of its damages, together with attorneys' fees and other costs, expenses and legal remedies.

We would appreciate the City's prompt attention to this proposal. If you have any questions, feel free to call me.

Very truly yours,

HELLER, EHRMAN, WHITE & MCAULIFFE



Ralph H. Palumbo

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INDEMNITY AGREEMENT AND RELEASE

The City of Seattle ("City") and Evergreen Marine Leasing, Inc. ("EML"), enter into this settlement agreement and release on _____, 1991.

I. INTRODUCTION

A. EML owns the property located at 7400 8th Avenue South and 7343 East Marginal Way South, in Seattle, Washington, including a portion of Slip 4 in the Duwamish Waterway. Slip 4 sediments are contaminated with polychlorinated biphenyls ("PCBs"), polynuclear aromatic hydrocarbons ("PAHs"), and heavy metals.

B. The City of Seattle, pursuant to statutory authority, owns and maintains a basic collector sewer system and also owns and maintains a storm water system. As part of the sewer and storm water systems, the City owns and maintains certain CSOs and storm water outfalls that discharge to Slip 4 and the Duwamish River.

C. Periodically, Slip 4 was dredged to maintain adequate depth to allow barge access. Dredge spoils, including the contaminants present in Slip 4 sediments, were deposited on Parcel D. *→ by whom?*

D. It has been alleged that the contaminants present in Slip 4 were released from the sewer and storm water system owned and maintained by the City. Further, it has been alleged that the City is liable under State of Washington and federal law for remedial action (cleanup) costs that may be incurred and for damages for injury to, destruction of, and loss of natural resources.

E. EML has incurred costs to investigate the extent and source of contamination in Slip 4 and on Parcel D. EML will be required to incur additional such costs in order to characterize the nature and extent of contamination and evaluate and assess remedial, cleanup and natural resource damage restoration actions. Costs incurred by EML are consistent with the National Contingency Plan and applicable State law and regulations.

F. Without admission of liability or of any fact or issue of law by the City, the parties desire to settle and compromise any and all claims EML may have against the City with respect to contamination present in Slip 4 and on Parcel D.

A. DEFINITIONS

A. "Environmental laws" shall mean all applicable federal, State, County or local statutes, laws, regulations, rules, ordinances, codes, licenses, permits, judgments, writs,

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decrees, injunctions or orders of any governmental entity relating to environmental (air, water, groundwater, soil, noise and odor) matters, including, without limitation, the Federal Clean Air Act, 42 U.S.C. § 7401 et seq., the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., the Resource Conservation and Recovery Act, as amended by the Hazardous and Solid Waste Amendments of 1984 ("RCRA"), 42 U.S.C. § 6901 et seq., CERCLA, the Hazardous Materials Transportation Act, 49 U.S.C. § 1891 et seq., the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq., the Safe Drinking Water Act, 42 U.S.C. § 1401 et seq., the Washington Hazardous Waste Management Act, Chapter 70.105 RCW, the Washington Model Toxics Control Act ("MTCA"), Chapter 70.105D RCW, the Washington Water Pollution Control Act, Chapter 90.48 RCW, the Washington Clean Air Act, Chapter 70.94 RCW, the Washington Solid Waste Management, Recovery and Recycling Act, Chapter 70.95 RCW, the Washington Shorelines Management Act, Chapter 90.58 RCW, the Washington Nuclear Energy and Radiation Act, Chapter 70.98 RCW, and the Washington Radioactive Waste Storage and Transportation Act of 1980, Chapter 70.99 RCW.

B. "Habitat development" includes acquiring living natural resources for the purpose of habitat restoration and replacement and any program, technique, method, or other means of creating or enhancing aquatic or benthic habitat in the Duwamish River or Elliott Bay.

C. "Hazardous substances, pollutants or contaminants" shall have the meanings assigned to those terms in CERCLA and MTCA.

D. "Natural resource damages" means damages for injury to, destruction of, or loss of any and all natural resources caused in whole or in part by releases of hazardous substances into the environment.

E. "Release" shall have the meaning assigned to that term in CERCLA.

F. "Removal, remedial and cleanup action" shall have the meanings assigned to those terms in CERCLA and MTCA.

G. "Sediment remediation" includes, but is not limited to, any program, technique, method, or other means of dredging, removing, cleansing, isolating, immobilizing, bioremediating, capping, or containing sediments beneath the waters of the Duwamish River and Elliott Bay that contain hazardous substances.

H. "Source control" means any program, technique, method, or other means of restricting or eliminating the discharge or other release of hazardous substances into Metro's and the City's CSO and/or storm water outfall systems.

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I. "Trustees" means the National Oceanic and Atmospheric Administration (NOAA), the federal Department of the Interior, the federal Department of Commerce, the Washington Departments of Ecology, the Washington Department of Fisheries, the Washington Department of Wildlife, the Washington Department of Health, the Washington Department of Natural Resources, the Suquamish Indian Tribe, the Muckleshoot Indian Tribe, and any other State or federal agency or Indian tribe that is designated a trustee for natural resource damages under State or federal law.

I. HOLD HARMLESS

A. SLIP 4 INDEMNITY

The City hereby indemnifies and holds EML and its successors harmless with respect to any and all claims, causes of action, damages, fines, judgments, penalties, losses, costs, and any other civil or administrative liability, including any and all costs for investigation, removal, remedial and cleanup actions, sediment remediation, habitat development, restoration, rehabilitation, acquisition of equivalent resources, source control actions, natural resource damages, and equitable relief arising out of any actions taken by the Trustees, the Washington State Department of Ecology, the United States Environmental Protection Agency, and/or any other federal, state or local agency or private party related to the release of hazardous substances, pollutants or contaminants to Slip 4, PROVIDED that such indemnity shall not cover any stormwater permit requirements that may be imposed on EML and its successors by any governmental agency. ?

The City shall have authority to negotiate with governmental agencies and the Trustees with respect to removal, remedial and cleanup actions, and sediment remediation, habitat development and source control actions on EML's property.

Ne | The City shall have access to EML's property for purposes of investigation or conducting removal, remedial and cleanup actions and sediment remediation, habitat development and source control actions related to the sediment contamination present in Slip 4, including dredging, capping, and construction of near shore fill on property owned by EML, PROVIDED that none of these actions shall interfere with barge use and access to the dock and property described as Parcel D. For the purposes of this Agreement, barge use and access is defined as maintaining Slip 4 at a depth of _____ and a length of _____, PROVIDED HOWEVER, that, in the event that an enforceable administrative or judicial order requires the City to conduct an action that interferes with barge access, the City agrees to pay EML or its successors, a cash amount that is equal to the difference between the value of EML's property with barge access and without barge access. Such value shall be agreed upon by the parties or established by an appraisal process pursuant to Paragraph -- hereof.

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B. PARCEL D INDEMNITY

No EML & dredger are responsible.

The City agrees to indemnify, defend, reimburse and hold EML and its successors harmless with respect to any and all claims or causes of action, damages, fines, judgments, penalties, liabilities or losses, costs, and any other civil or administrative liability, including the costs of investigation, removal, remedial and cleanup actions, sediment remediation, habitat development, restoration, rehabilitation, acquisition of equivalent resources, source control, natural resource damages, and equitable relief arising out of any actions taken by the Trustees, the Washington State Department of Ecology, the United States Environmental Protection Agency, and/or any other federal, state or local agency or private party related to polychlorinated biphenyl ("PCB") and metals contamination on Parcel D (see attached Figure 1).

C. COSTS AND DAMAGES INCURRED

The City agrees to pay EML _____ dollars (\$ _____) to reimburse EML for monies it has expended to date with respect to releases of hazardous substances, pollutants or contaminants to Slip 4 and Parcel D, and for other costs and damages suffered by EML related to such releases. No

III. RELEASE

In consideration of the obligations assumed by the City above, EML hereby releases and discharges the City from all claims, actions and claims for relief that EML has asserted or may assert against the City arising out of the release of hazardous substances, pollutants, or contaminants to Slip 4 and Parcel D.

IV. MISCELLANEOUS PROVISIONS

A. ENTIRE AGREEMENT

This agreement contains the entire understanding between the parties and supersedes any prior understandings and agreements between them respecting the subject matter hereof. There are no other representations, agreements, arrangements or understandings, oral or written, between and among the parties, or any other amendment of or supplement to this Agreement. No amendment or supplement to this Agreement shall be valid or effective unless made in writing and executed by the parties hereto subsequent to the date of this Agreement.

B. ATTORNEYS' FEES

In any action between any or all of the parties or their successors to enforce any of the terms of this Agreement or any other agreement relating to or arising out of or pertaining to

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this Agreement, the prevailing party shall be entitled to recover expenses, including actual attorneys' fees, based on such attorneys' normal hourly rates, at all trial and appellate levels.

C. BINDING EFFECT

This agreement shall be binding upon and inure to the benefit of each party and its successors and assigns, including with respect to EML all persons now or hereafter holding or having all or any part of the EML's interest in Slip 4 and Parcel D.

IN WITNESS WHEREOF, the parties to this Agreement have set forth their signatures effective the date first set forth above.

By
for Evergreen Marine Leasing, Inc.

SIGNED OR ATTESTED before me on this ____ day of _____, 1991 by _____.

NOTARY PUBLIC in and for the State
of Washington, residing at

My appointment expires _____

By
for City of Seattle

SIGNED OR ATTESTED before me on this ____ day of _____, 1991 by _____.

NOTARY PUBLIC in and for the State
of Washington, residing at

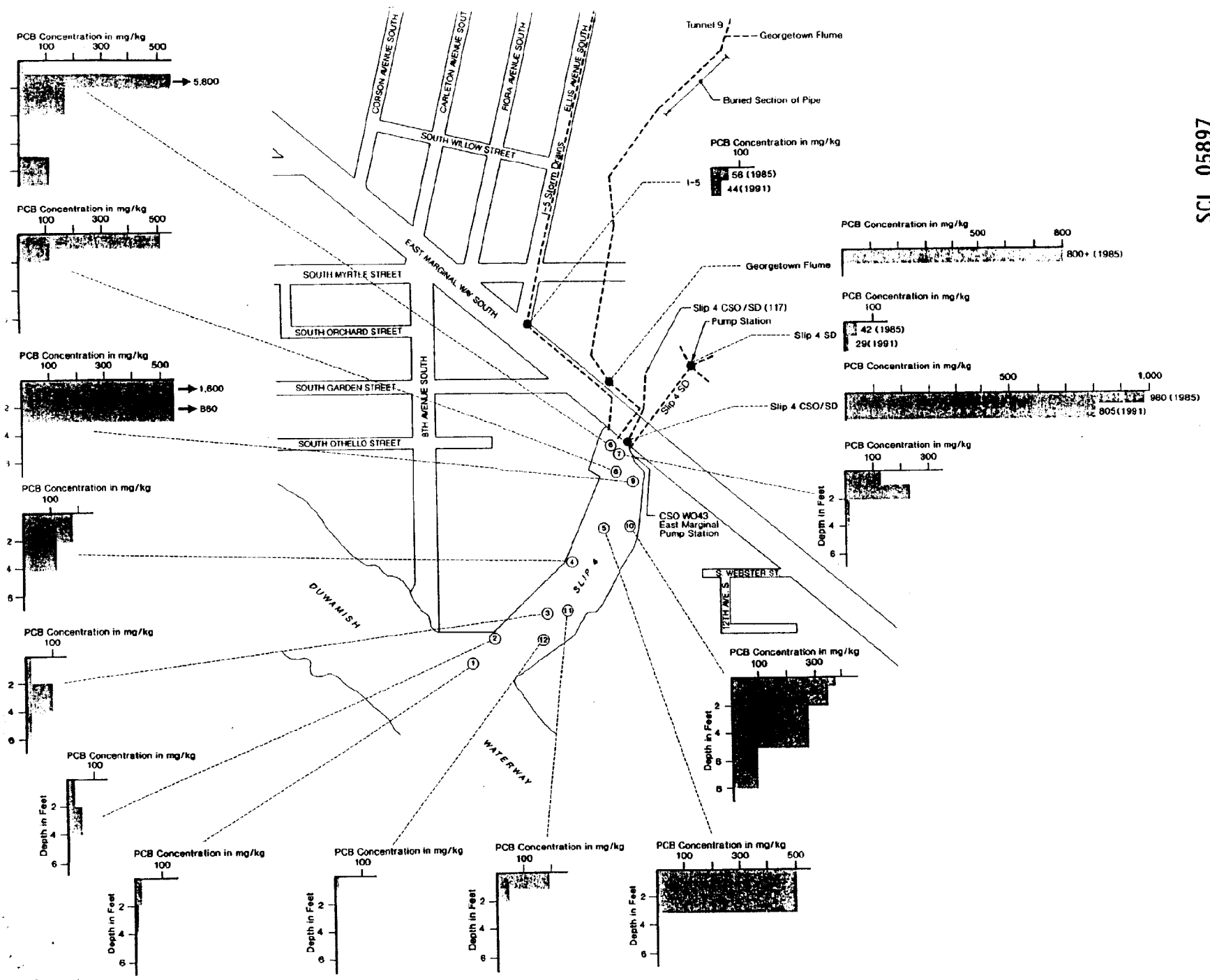
My appointment expires _____

I:\THS\FIRSTBAN\INDEMNIT

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SEATTLE CITY ATTORNEY
MARK H. SIDRAN

James A. Tupper, Jr.

December 17, 1991

Ralph Palumbo
Heller, Ehrman, White & McAuliffe
6100 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7098

Re: Slip 4 Contamination

Dear Mr. Palumbo:

I have received your letter of December 13th. While the City is willing to consider your proposal, we need more specific information regarding the nature and extent of contamination.

I understood from our meeting on November 13th that you would provide data and reports prepared on behalf of the Boeing Company and by Hart Crowser. In particular, we would like the specific data relating to both the slip and the upland property.

Could you see that this information is forwarded to my attention.

Very truly yours,

Mark H. Sidran
City Attorney

By:


James A. Tupper, Jr.
Assistant City Attorney

ENVIRONMENTAL PROTECTION SECTION
1111 THIRD AVENUE, SUITE 2640, SEATTLE, WASHINGTON 98101-3207
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